



Inquiry into the *Marriage Amendment Bill 2012* and *Marriage Equality Amendment Bill 2012*

**House of Representatives Social Policy and
Legal Affairs Committee**

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Executive Summary

1. The Law Council believes that marriage is a human right which should be made available to all people.
2. The Law Council believes that the legal restriction on same-sex marriage is an important human rights and rule of law issue. All people are equal before the law and should be entitled to the same fundamental rights.
3. The Law Council considers the *Marriage Act 1961* (the Marriage Act) to be discriminatory insofar as it restricts marriage to the union of a man and a woman, and therefore, specifically excludes same-sex couples. This leads to a significant number of people being prevented from accessing the full range of legal rights and protections that are conferred by marriage, solely on the basis of their sex, sexual orientation and gender identity.
4. The Law Council does not believe that discrimination against same-sex couples can be adequately addressed without changing the law in relation to marriage. Accordingly, the Law Council welcomes the objectives of the *Marriage Equality Amendment Bill 2012* (the Bandt-Wilkie Bill) and *Marriage Amendment Bill 2012* (the Jones Bill) to create marriage equality and bring an end to the discrimination currently faced by sections of the community who would like to marry their partner, but are unable to do so simply because of their non-heterosexual status.
5. The Law Council encourages the House of Representatives Social Policy and Legal Affairs Committee (the Committee) to push for greater equality in Australian society and support same-sex marriage in Australia.
6. The Law Council makes the following recommendations to the Committee in relation to the Bills:
 - a) That the Committee should recommend that reforms to the definition of marriage in the Marriage Act be considered; and
 - b) That the Committee should support the Bills' proposal to repeal section 88EA of the Marriage Act so that same-sex marriages that are solemnised overseas are able to be recognised in Australia.

Introduction

7. The Law Council of Australia is pleased to provide the following submission to the Committee in response to its inquiry into the Jones and Bandt-Wilkie Bills.
8. The purpose of both the Jones and Bandt-Wilkie Bills is to establish marriage equality for same-sex couples by making a number of amendments to the *Marriage Act 1961* ('the Marriage Act'). Both Bills propose amendments to the definition of marriage so that the definition is broadened to apply to the union of two people, as opposed to the union of a man and a woman. The Bills also seek to amend the Marriage Act by removing the prohibition on the recognition of same-sex marriages that are solemnised in foreign countries.
9. The Law Council notes that an additional Bill dealing with same-sex marriage, the *Marriage Equality (Amendment) Bill 2010* is also currently the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee. The Law Council is also making a submission to this Committee.
10. The Law Council has extensively advocated for the elimination of all forms of discrimination in Australia and the promotion of equality. The Law Council has made a number of submissions in support of same-sex marriage and the removal of discrimination based on sex, sexuality and gender identity in recent years. These include submissions to:
 - a) the Australian Human Rights Commission on its 'Consultation on the protection from discrimination on the basis of sexual orientation, and sex and/or gender identity' in November 2010;¹
 - b) the Senate Legal and Constitutional Affairs Legislation Committee on its 'Inquiry into the *Marriage Equality Amendment Bill 2009*' in August 2009;²
 - c) the 'National Consultation on Human Rights' in May 2009;³
 - d) the Senate Legal and Constitutional Affairs Committee on its 'Inquiry into the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*' in September 2008;⁴ and

¹ Law Council Submission to Australian Human Rights Commission, *Consultation on the protection from discrimination on the basis of sexual orientation, and sex and/or gender identity*, 29 November 2010. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=C0CF61FC-BFA6-FE30-FE27-CAF63B6144DF&siteName=lca.

² Law Council Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Equality Amendment Bill 2009*, 28 August 2009. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=98E7D213-D20E-CA3B-4888-C894C4843C04&siteName=lca.

³ Law Council Submission to the National Consultation on Human Rights, *A Charter: Protecting the Rights of All Australians*, 6 May 2009. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8A2A9585-1E4F-17FA-D2E6-585D7F729F44&siteName=lca.

⁴ Law Council Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*, 16 September 2008. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=98E8D779-FAE5-3192-C304-40BFB6120981&siteName=lca.

- e) the Senate Legal and Constitutional Affairs Committee on its 'Inquiry into the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008* in July 2008.⁵
11. In line with these past submissions, this submission will support the concept of same sex marriage and the removal of discrimination against same-sex couples. This submission will also provide an overview of:
- a) The current definition of marriage in the Marriage Act and at common law;
 - b) What the Jones and Bandt-Wilkie Bills propose to do;
 - c) Australia's international human rights obligations in relation to same-sex marriage; and
 - d) Same-sex marriage laws in other common law countries – specifically Canada and South Africa.

Current definition of marriage in the Marriage Act

12. Subsection 5(1) of the Marriage Act currently defines 'marriage' as the:
- "...union of a man and a woman to the exclusion of all others, voluntarily entered into for life".⁶*
13. This definition was introduced into the Marriage Act by the *Marriage Amendment Act 2004*. The Explanatory Memorandum to the relevant Bill noted that the introduction of the definition was considered necessary to ensure that the traditional notion of marriage as being between a man and a woman was not 'eroded' over time, and that same-sex relationships could not be equated with marriage.⁷
14. The *Marriage Amendment Act 2004* also introduced section 88EA into the Marriage Act to prevent same-sex marriages conducted overseas from being recognised in Australia.
15. The Law Council is of the view that the current definition of marriage, as introduced by the *Marriage Amendment Act 2004*, is discriminatory insofar as it restricts marriage to the union of a man and a woman, and therefore, specifically excludes same-sex couples. The effect of such a definition is that a significant number of people are prevented from accessing the full range of legal rights and protections that are conferred by marriage, solely on the basis of their sex, sexual orientation and gender identity.
16. Interestingly, when it was first introduced in 1961, the Marriage Act did not explicitly include a definition of 'marriage'. The Marriage Act relied on the common law definition of marriage in provisions such as section 46 which includes the words that authorised marriage celebrants (other than ministers of religion) must say before the marriage is solemnised. Ministers of religion are exempted from saying these words if the Attorney-General is satisfied that the form of the religious ceremony sufficiently states the nature and obligations of marriage. These words are included in what certain celebrants must say:

⁵ Law Council Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008*, 29 July 2008. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=98E9C02C-9E61-C79D-1AD1-20A45C12F6C8&siteName=lca.

⁶ S.5(1), *Marriage Act 1961* (Cth)

⁷ Explanatory Memorandum, *Marriage Amendment Bill 2004* (Cth).

“Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”⁸

17. This common law understanding of marriage is generally attributed to the 1866 case of *Hyde v Hyde & Woodmansee*.⁹ This case concerned a husband's request for the dissolution of his marriage as a result of alleged adultery by his wife. In reiterating the importance of marriage and the elements of which it is comprised, Lord Penzance stated that:

“...marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.”¹⁰

18. Marriage has also traditionally been promoted and perceived as necessary for the legitimate creation of children. Whilst such a belief is largely based on religious perceptions and understandings of marriage, the courts have found that the validity of marriage does not depend on a couple's physical ability to have children¹¹ and that a marriage will be valid regardless of whether a couple has children or not.¹²
19. The definition of marriage in section 5(1), and the wording used in section 46 of the Marriage Act reflect traditional historical, religious and cultural understandings of the concept. This wording has been considered by a number of cases, particularly in relation to what is meant by the words ‘union of a man and a woman’.¹³ This question was considered in detail in the case of *Re Kevin: Validity of Marriage of Transsexual (Re Kevin)*.¹⁴
20. *Re Kevin* concerned a request for a declaration as to whether the marriage between Kevin (a post-operative transsexual who was born female, but considered himself to be male at the date of his marriage) and Jennifer (a biological female) was valid under Australian law. The applicants, Kevin and Jennifer, argued that Kevin was a man for the purposes of the law of marriage, and that the Family Court should declare that the marriage was valid. The Commonwealth Attorney-General argued that Kevin was not a man for the purpose of the law of marriage as he was born female, and that the application should therefore be dismissed.
21. In the past, the Family Court had followed the reasoning of Ormrod J in *Corbett v Corbett (otherwise Ashley)*¹⁵ in order to determine if a person was a man or a woman. This case concerned the validity of the marriage of Arthur Corbett to April Ashley which took place in 1963. April Ashley was born male, but underwent a sex change operation in 1960 and had since lived as a woman. After only 14 days of marriage, Arthur Corbett sought a declaration that the marriage was null and void due to the fact that April was a person of the male sex, or alternatively for a decree of nullity on the ground of non-consummation.

⁸ S.46, *Marriage Act 1961* (Cth).

⁹ *Hyde v Hyde & Woodmansee*, (1866) LR 1 P&D 130 per Lord Penzance.

¹⁰ *Ibid.*

¹¹ See for example *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158 at para 285.

¹² *Ibid.*

¹³ See for example *Khan v Khan* [1963] VR 203 at 204 *Calverley v Green* (1984) 155 CLR 242 at 259–60; *R v L* (1991) 174 CLR 379 at 392; and *Re Brown v Commissioner for Superannuation* (1995) 38 ALD 344.

¹⁴ (2001) 28 Fam LR 158

¹⁵ [1970] 2 All ER 33

22. In arriving at his decision as to whether April was a man or a woman for the purpose of the marriage, Ormrod J stated that a person's true sex is determined at the time of birth by examining three biological factors – chromosomes, gonads, and genitals.¹⁶ In other words, a person's sex was not to be determined at the date that they were married.
23. Ormrod J ultimately held that because marriage is essentially a relationship between a man and a woman, the validity of the marriage in the Corbett case depended on whether the respondent was or was not a woman. Because the respondent was a biological male from birth, Ormrod J found the marriage to be void.¹⁷
24. Chisholm J rejected this reasoning in *Re Kevin*, instead finding that:
- “...the question of whether a person is a man or a woman is to be determined as at the date of the marriage.”¹⁸*
25. Chisholm J added that:
- “...in the context of the rule that the parties to a valid marriage must be a man or a woman, the word “man” has its ordinary current meaning according to Australian usage.”¹⁹*
26. In arriving at his decision, Chisholm J took into account Kevin's 'brain-sex' and the opinions of Kevin's family and friends who indicated that Kevin had always considered himself to be male and had acted accordingly. In outlining what he meant by the term 'brain-sex', Chisholm J stated:
- “To some extent, the discussion and the submissions by the applicants suggest that it can now be said that brain sex, manifested in the person's self-image, is ultimately the sole or true indicator of the person's true sex: as Ms Wallbank succinctly put it, what is between the ears is more important than what is between the legs. I agree that the medical evidence shows that there is a biological difference, associated with the brain, between transsexuals and other people. It also seems possible, or even likely, that this feature of the brain determines whether individuals think of themselves as men or women, whatever their other biological characteristics, although the medical evidence does not expressly assert this.”²⁰*
27. Chisholm J ultimately concluded that Kevin was a man at the date of his marriage to Jennifer and that therefore, their marriage was valid under Australian law.
28. This decision was appealed in *Attorney-General for the Commonwealth v Kevin and Others*²¹. The Attorney-General argued amongst other things, that the Court should have applied the test in the Corbett case when deciding whether Kevin was a man or a woman for the purposes of the law of marriage in Australia.²² The appeal was dismissed.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ (2001) 28 Fam LR 158 at para 330.

¹⁹ Ibid.

²⁰ Ibid., at para 273.

²¹ (2003) 30 Fam LR 1

²² Ibid. The Attorney-General alleged that Chisholm J had erred with respect to the following: (i) in determining that while the respondent husband at birth had female chromosomes, gonads and genitals, he was a man for the purpose of the Marriage Act at the time of his marriage; (ii) in finding that considerations in addition to the congruence of a person's chromosomes, gonads and genitals were relevant to determining a

29. The Full Court of the Family Court supported Chisholm J's reasoning, finding that he was correct in rejecting the Corbett test on this occasion. In handing down their decision, the Full Court explained that it had:

*"...difficulty in understanding how the Corbett test can continue to be applied in face of the evidence, not only as to brain sex, but also as to the importance of psyche in determining sex and gender. The fact that these issues cannot be physically determined at birth seems to us to present a strong argument: first, that a child's sex cannot be finally determined at birth; and second, that any determination at that stage is not and should not be immutable."*²³

30. In addition to this, the Full Court acknowledged that the concept of marriage should be interpreted as an evolving institution, stating that:

*"...it is plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time."*²⁴

31. The Full Court also noted that:

*"It seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901. We therefore approach the matter on the basis that it is within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition."*²⁵

32. McHugh J also alluded to a broader interpretation of the definition of marriage in obiter comments that he made in *Re Wakim; Ex parte McNally*²⁶ where he stated:

"...in 1901 'marriage' was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same-sex marriages, although arguably 'marriage' now means, or in the near future, may mean, a voluntary union for life between two people to the exclusion of others."

33. The decision in *Re Kevin* and the comments of McHugh J in *Re Wakim* indicate an openness by certain members of the judiciary to interpret the concept of marriage more broadly than in the past. However, to put the matter beyond doubt, the Law

person's sex for the purpose of the law of marriage; (iii) in having regard to evidence about brain sex as a relevant consideration in determining whether a person is a man for the purposes of the law of marriage; (iv) in considering that social acceptance of a person's sex is a relevant consideration in determining whether a person is a man for the purposes of the law of marriage; (v) in holding that the ordinary meaning of man for the purpose of the Marriage Act includes a post-operative female to male transsexual; (vi) in rejecting that there were special considerations applicable to marriage for the purpose of construing the meaning of "man" and "woman" in the Marriage Act; (vii) in rejecting the contention that it is for the parliament to determine whether a post-operative transsexual may marry as a person of the sex other than their biological sex at birth; and (viii) in not holding that if a person's chromosomes, gonads and genitals are congruently of one sex at birth, that is determinative in deciding whether the person is a man or woman for the purposes of marriage.

²³ *Attorney-General for the Commonwealth v Kevin and Others* (2003) 30 Fam LR 1 at para 295.

²⁴ *Ibid.*, at para 87.

²⁵ *Ibid.*, at para 100.

²⁶ (1999) 163 ALR 270 at para 45.

Council is of the view that the Committee should recommend that reforms to the definition of marriage in the Marriage Act be considered.

Marriage and the Constitution

34. The issue of whether Parliament has the power under the Constitution to legislate with respect to same-sex marriage has been discussed by a number of commentators.²⁷
35. Section 51(xxi) of the Constitution provides that the Parliament has the power to “make laws for the peace, order, and good government of the Commonwealth” with respect to marriage.²⁸
36. Some academics have expressed doubt as to whether the High Court would find that the marriage power under section 51(xxi) includes same-sex marriage.²⁹ Others have concluded that the Constitution may be interpreted as granting the Parliament the requisite power to legislate with respect to same-sex marriage.³⁰
37. Central to discussions on this issue is whether the marriage power in the Constitution should be interpreted in accordance with the meaning the drafters intended it to have in 1900, or if in fact it should be interpreted in accordance with evolving social attitudes. As noted by the Gilbert and Tobin Centre of Public Law:

*“On one view, the permissible meanings of the provision are limited by the framer’s intentions. This might mean that ‘marriage’ includes only different-sex unions and cannot now be enlarged. Alternatively, as Justice McHugh’s comments indicate, it might be argued that gender is not central to the constitutional definition of ‘marriage’ which is instead focussed upon the commitment of two people to a voluntary and permanent union.”*³¹
38. Professor Geoffrey Lindell has suggested it may be possible for the Commonwealth to legislate with respect to same-sex marriage if the High Court interprets such unions as satisfying the essential meaning of the term ‘marriage.’³² In order for the High Court to do this, the Court would need to interpret ‘marriage’ more broadly than what it has done in the past.³³

²⁷ See for example George Williams, 2006, ‘Advice regarding the proposed Same-Sex Marriage Act’, *Constitutional Law and Policy Review*, 9(2), p.22. See also Geoffrey Lindell, ‘Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia,’ *Sydney Law Review*, 30(27). Available from http://sydney.edu.au/law/slr/slr30_1/Lindell.pdf.

²⁸ See s.51(xxi), Commonwealth of Australia Constitution Act

²⁹ See Andrew Lynch, George Williams & Ben Teeger, Gilbert and Tobin Centre for Public Law Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into Marriage Equality Amendment Bill 2009*, 28 August 2009. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/marriage_equality/submissions/sublist1a.htm

³⁰ Geoffrey Lindell, ‘State legislative power to enact same-sex marriage legislation and the effect of the *Marriage Act 1961* (Cth) as amended by the *Marriage Amendment Act 2004* (Cth), *Constitutional Law and Policy Review*, October 2006, 9(2), p.5.

³¹ Professor Andrew Lynch, Professor George Williams AO and Emily Burke, Gilbert and Tobin Centre for Public Law Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Marriage Equality Amendment Bill 2010*, 15 March 2012, p.3. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/marriage_equality_2012/submissions.htm.

³² Above at n 30.

³³ *Ibid.*.

39. Other academics have suggested that the High Court may interpret 'marriage' in accordance with the meaning it had in 1900: that is, as a heterosexual union. If the Court chose to interpret marriage in this way, it has been suggested that it would be difficult for the Court to extend the concept to same-sex marriages, given that heterosexuality was likely to have been central to the concept of marriage in 1900.³⁴
40. Ultimately, only the High Court can conclusively determine if the Commonwealth Parliament has power to legislate for same-sex marriage. However, the Law Council considers that there is sufficient scope for the Committee to proceed to examine draft legislation on the basis that the Commonwealth Parliament has such power.

What the Bills propose to do

41. As noted previously, both the Jones and Bandt-Wilkie Bills have a similar purpose: that is, to establish marriage equality for same-sex couples by making a number of amendments to the Marriage Act. Whilst both Bills propose amendments to the definition of marriage in order to facilitate this, the proposed definitions are quite different.

The Jones Bill

Objects clause

42. The object of the Jones Bill is:

"...to ensure equal access to marriage for all adult couples irrespective of sex who have a mutual commitment to a shared life."

43. Part II of the Marriage Act allows people under the age of 18 to marry in certain circumstances. Including the word 'adult' in the objects clause leads to inconsistency with Part II. Accordingly, one of the Law Council's Constituent Bodies, the Law Institute of Victoria (LIV), has suggested that the objects clause be amended so that it reads:

"The object of this Act is to amend the Marriage Act 1961 to ensure equal access to marriage for all couples irrespective of sex who have a mutual commitment to a shared life, consistent with Australia's international obligations."

44. The Law Council submits that the Committee should consider recommending such an amendment and also recommending that the term 'sex' be defined as outlined below due to the meaning of that term not being settled in the context of terminology relevant to the Lesbian, Gay, Bisexual Trans and Intersex (GLBTI) Community.

Definition of 'marriage'

45. The Jones Bill proposes to repeal the definition of marriage in subsection 5(1) of the Marriage Act and replace it with the following:

³⁴ Margaret Brock & Dan Meagher, 'The legal recognition of same-sex unions in Australia: a constitutional analysis,' *Public Law Review*, December 2011, 22(4), p.270.

"Marriage means the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life."

46. The proposed definition broadens the definition of marriage by removing the reference to the union of 'a man and a woman', and replacing this with the words 'two people, regardless of their sex'.
47. The Law Council supports the broadening of the definition so that it applies to the union of two people, as opposed to the union of a man and a woman. However, the Law Council is concerned that the phrase 'regardless of their sex' may be too narrow to achieve marriage equality for same-sex couples as the reference to 'sex' in this context may not encompass all people who consider themselves part of the Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) community.³⁵ Other concepts associated with gender or sexual orientation may be more inclusive of members of the LGBTI community.
48. In *Re Kevin*, Dawson J highlighted the difficulties in using the terms sex and gender, stating "the words are used in various ways..." and that "...their usage depends in part on what the speaker understands to be the nature of sexual identification."³⁶ These views are shared by the Australian Human Rights Commission who has also indicated that the definitions of these terms vary, and that in the case of 'sex', there is still no consensus as to exactly how this term should be defined.³⁷
49. Whilst it has been suggested that the term 'sex' commonly refers to one's biologically determined characteristics³⁸ and whether they are male or female,³⁹ there are differing views as to exactly which of these biologically determined characteristics actually determine one's sex. The issue is further complicated by the fact that "...in reality, individuals' sex characteristics exist on a fluid and medically or socially constructed continuum"⁴⁰ and that "...while the 'typical' sex chromosomes are XX for females and XY for males, there are many variations in this genetic chromosomal dichotomy, including XXY, XYY, XXX, and XO (no second chromosome)."⁴¹ Interpreting the word 'sex' as referring to either male or female is therefore problematic insofar as it ignores the diversity of human sex characteristics.
50. Gender is traditionally understood to be a sociological rather than scientific concept. Furthermore, a person's gender identity does not necessarily need to match their sex.
51. The Yogyakarta Principles provide some guidance as to what the terms 'sexual orientation' and 'gender identity' are understood to mean. These principles were developed by a group of international human rights experts in 2007.⁴²
52. The Yogyakarta Principles are not binding, but provide useful guidance for States in interpreting what their international human rights obligations are in relation to

³⁵ See Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records*, 2009, p.7. Available from http://www.hreoc.gov.au/genderdiversity/sex_files2009.html.

³⁶ *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158 at para 16.

³⁷ Above at n 35.

³⁸ These commonly refer to physical attributes, genitals, gonads, hormones and 'brain-sex'. However, there are different views as to which of these factors actually determine sex.

³⁹ Above at n 35.

⁴⁰ Joy Johnson, Lorraine Greaves & Robin Repta, 'Better science with sex and gender: Facilitating the use of a sex and gender-based analysis in health research,' *International Journal for Equity in Health*, 6 May 2009, 8(14).

⁴¹ *Ibid.*

⁴² http://www.yogyakartaprinciples.org/principles_en.pdf

protecting sexual orientation and gender identity. The Principles reaffirm the rights of all people to equality before the law and freedom from discrimination on the basis of sexual orientation and gender identity.⁴³

53. 'Gender identity' is referred to in the Yogyakarta Principles as:

*"...each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."*⁴⁴

54. The Australian Government supports the Yogyakarta Principles and has outlined its intention to promote resolutions in support of the implementation of human rights protections for lesbians; gay men; bisexual; transgender; and intersex people at the Human Rights Council and the General Assembly of the United Nations.⁴⁵

55. According to the Yogyakarta Principles, 'sexual orientation' refers to:

"...each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."

56. In relation to the Jones Bill, the Law Council submits that possible difficulties which may arise from the use of the phrase 'regardless of sex' may be overcome by:

- (a) Inserting a broad definition of 'regardless of sex';
- (b) Using a phrase such as 'regardless of sex, sexual orientation or gender identity' (as in the Bandt-Wilkie Bill); or
- (c) Adopting the same definition of marriage that is used in the Canadian *Civil Marriage Act 2005* which does not refer to the term 'sex' at all and instead, simply defines marriage as:

*"...the lawful union of two persons to the exclusion of all others."*⁴⁶

57. The Law Council submits that the Committee should consider the above alternatives in relation to the Jones Bill.

Words to be used by certain authorised celebrants

58. Section 46 of the Marriage Act includes the words that authorised marriage celebrants (other than ministers of religion) must say before the marriage is solemnised. Ministers of religion are exempted from saying these words if the Attorney-General is satisfied that the form of the religious ceremony sufficiently states the nature and obligations of marriage. These words are included in what certain celebrants must say:

"Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ <http://www.alp.org.au/getattachment/4842c994-4b65-49a9-a4bf-51fd0495e779/our-platform/>

⁴⁶ S.2, *Civil Marriage Act 2005* (Canada)

59. The Bill proposes to substitute the words 'two people' for the words 'a man and a woman' in section 46. The Law Council supports this amendment.

Obligations of authorised celebrant

60. One of the ways in which the Jones Bill differs from the Bandt-Wilkie Bill is through its proposed amendment to section 47 of the Marriage Act. Section 47 currently provides:

47 Ministers of religion not bound to solemnise marriage etc.

Nothing in this Part:

(a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or

(b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:

(i) longer notice of intention to marry than that required by this Act is given; or

(ii) requirements additional to those provided by this Act are observed.

61. The Jones Bill inserts an additional paragraph in section 47 as follows:

47 Ministers of religion not bound to solemnise marriage etc.

Nothing in this Part:

aa) imposes an obligation on an authorised celebrant being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex; or

62. This amendment effectively seeks to ensure that the Marriage Act explicitly states that ministers of religion do not have to solemnise same-sex marriages. However, section 47(a) already provides that ministers of religion are not under any obligation to solemnise "any marriage."⁴⁷
63. Although the proposed amendment to section 47 may not strictly be necessary, it may assist in clarifying the situation for ministers of religion, as may a provision based on the Canadian *Civil Marriage Act 2005* in relation to acknowledging the rights of religious officials to freedom of religion and conscience if choosing not to perform same-sex marriages. The Canadian provision is discussed below.

Recognition of same-sex marriages conducted overseas

64. The Jones Bill also repeals section 88EA of the Marriage Act to enable same-sex marriages entered into overseas to be recognised in Australia. Section 88EA currently provides:

⁴⁷ S.47(a) – Marriage Act 1961

88EA Certain unions are not marriages

A union solemnised in a foreign country between:

(a) a man and another man; or

(b) a woman and another woman;

must not be recognised as a marriage in Australia.

65. The Law Council has previously expressed concerns about the existence of section 88EA and the fact that this section may contravene Australia's obligations under Article 9 of the *Hague Convention on the Celebration and Recognition of the Validity of Marriages* (the Hague Convention).⁴⁸ Article 9 provides that:

*"A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter. A marriage celebrated by a diplomatic agent or consular official in accordance with this law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration."*⁴⁹

66. The Law Council notes that Articles 8, 11, 14 and 15 of the Hague Convention provide some exceptions to the recognition of marriages entered into in foreign countries. However, the Law Council does not consider that these exceptions justify the existing prohibition on the recognition of same-sex marriages entered into overseas. In particular, the Law Council does not believe that same-sex marriages should be considered to be against public policy, particularly given that the concepts of family and marriage continue to evolve.
67. The Law Society of South Australia (LSSA), LIV and the Law Society of NSW (LSNSW) consider that same-sex marriages solemnised overseas should be able to be recognised in Australia. Indeed, the LIV considers that there is no international legal basis upon which Australia can justify its non-recognition of foreign same-sex unions.
68. In light of the comments above, the Law Council supports the proposal in the Jones Bill to repeal section 88EA in the Marriage Act.

Persons whose consent is required to the marriage of a minor

69. The Schedule in the Marriage Act outlines whose consent is required in certain circumstances before a minor is allowed to get married. Other provisions of the Marriage Act deal with other processes in relation to the marriage of minors.
70. Table item 1 in Part III of the Schedule currently outlines whose consent is required where the minor is an adopted child and was adopted by a husband and wife jointly.
71. The Jones Bill proposes to amend this section so that the words 'husband and wife' are replaced with the words 'two people'.

⁴⁸ Above at n 2, p.7.

⁴⁹ Article 9, *Hague Convention on the Celebration and Recognition of the Validity of Marriages*. Available from http://www.hcch.net/index_en.php?act=conventions.text&cid=88

72. The LIV has suggested that the phrase 'husband and wife' should be replaced with the words 'a married couple' rather than 'two people' as the Schedule is intended to refer to adoptive parents who are already married in this context.
73. The Law Council submits that the Committee should consider recommending that this part of the Marriage Act be amended in line with the LIV's suggestion.

The Bandt-Wilkie Bill

Definition of 'marriage'

74. The Bandt-Wilkie Bill has three objectives:
- a. To amend the Marriage Act so that people are no longer discriminated against on the basis of sex, sexual orientation or gender identity; and
 - b. To recognise that freedom of sexual orientation and gender identity are fundamental human rights; and
 - c. To promote acceptance and the celebration of diversity.⁵⁰
75. The Bandt-Wilkie Bill proposes to meet these objectives by making a number of amendments to the Marriage Act. Central to these is repealing the definition of marriage in section 5(1) of the Marriage Act and substituting this with the following:
- "...marriage means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life."*⁵¹
76. In this regard, the Bill attempts to remove discrimination from the Marriage Act by amending the definition so that marriage, whilst continuing to be a union between two people, is no longer defined by gender or sex.⁵² A number of the Law Council's Constituent Bodies, namely the Law Society of the Northern Territory (LSNT); LSNSW; LIV; and the LSSA have expressed support for the removal of discrimination against people on the grounds of sexual orientation and gender identity.
77. As discussed above in relation to the phrase 'regardless of sex' in the Jones Bill, the Law Council considers that the phrase 'regardless of sex, sexual orientation and gender identity' may need to be defined given that these concepts do not appear to be settled.
78. Alternatively it may be prudent to adopt the same definition of marriage that is used in the Canadian *Civil Marriage Act 2005* which simply defines marriage as:

*"...the lawful union of two persons to the exclusion of all others."*⁵³

⁵⁰ *Marriage Equality Amendment Bill 2012*

⁵¹ *Ibid.*

⁵² Adam Bandt, First Reading Speech, *Marriage Equality Amendment Bill 2012*, 13 February 2012, p.25.

⁵³ S.2, *Civil Marriage Act 2005* (Canada)

Wording of ceremony

79. Sections 45(2) and 72(2) of the Marriage Act currently provide:

45 Form of ceremony

(2) Where a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorised celebrant and the witnesses, the words:

"I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband)";

or words to that effect.

72 Form and ceremony of marriage

(2) Unless, having regard to the form and ceremony of the marriage, the chaplain considers it unnecessary for the parties to the marriage to do so, each of the parties shall, in some part of the ceremony and in the presence of the chaplain and the witnesses, say to each other the words:

"I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband)";

or words to that effect.

80. The Bandt-Wilkie Bill proposes to amend sections 45(2) and 72(2) by inserting the words 'or partner' so that they would read:

45 Form of ceremony

(2) Where a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorised celebrant and the witnesses, the words:

"I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband, or partner)";

or words to that effect.

72 Form and ceremony of marriage

(2) Unless, having regard to the form and ceremony of the marriage, the chaplain considers it unnecessary for the parties to the marriage to do so, each of the parties shall, in some part of the ceremony and in the presence of the chaplain and the witnesses, say to each other the words:

"I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband, or partner)";

or words to that effect.

81. The LIV has suggested that it can be implied through the phrase 'or words to that effect' that 'a partner' is covered by these subsections, and that therefore, the proposed amendments to sections 45(2) and 72(2) are unnecessary.
82. The Law Council submits that the Committee should consider whether the proposed amendments to sections 45(2) and 72(2) are necessary.

Words to be used by certain authorised celebrants

83. Section 46 of the Marriage Act includes the words that authorised marriage celebrants (other than ministers of religion) must say before the marriage is solemnised. Ministers of religion are exempted from saying these words if the Attorney-General is satisfied that the form of the religious ceremony sufficiently states the nature and obligations of marriage. These words are included in what certain celebrants must say:

"Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

84. The Bill proposes to substitute the words 'two people' for the words 'a man and a woman' in section 46. The Law Council supports this amendment.

Recognition of same-sex marriages conducted overseas

85. As in the case of the Jones Bill, the Bandt-Wilkie Bill also proposes to repeal section 88EA of the Marriage Act to enable same-sex marriages solemnised overseas to be recognised in Australia.
86. The Law Council supports this amendment as discussed in relation to the Jones Bill.

Persons whose consent is required to the marriage of a minor

87. As in the case of the Jones Bill, the Bandt-Wilkie Bill also proposes to amend Table Item 1 in Part III of the Schedule in the Marriage Act so that it refers to 'two people' rather than 'husband and wife' in the context of the persons whose consent is required to the marriage of a minor in certain circumstances.
88. The Law Council supports the LIV's suggested amendment to this part of the Schedule as discussed in relation to the Jones Bill.

Australia's International Human Rights Obligations

89. Australia's international human rights obligations with respect to the rights to equality and freedom from discrimination are particularly relevant to same-sex marriage. These obligations are outlined in Articles 2, 23 and 26 of the International Covenant on Civil and Political Rights (ICCPR).
90. Article 2 of the ICCPR provides that States parties must respect the ICCPR rights of all people without distinction of any kind, including on the grounds of sex. It also obliges States parties to adopt such laws or other measures as may be necessary to give effect to the rights; and to ensure that any person whose rights or freedoms under the ICCPR are violated, have access to an effective and enforceable remedy.
91. In addition to this, Article 23 of the ICCPR states that all people have the right to marry.
92. These articles were considered by the United Nations Human Rights Committee (UNHRC) in the 2002 case of *Joslin v New Zealand*.⁵⁴ This case concerned two lesbian couples who, despite pooling financial resources and caring for each other's children from previous relationships, were refused notices of intended marriage by their local Registry offices. The couples claimed that their rights under Articles 2, 16, 17, 23 and 26 of the ICCPR had been breached and that that the failure of the New Zealand Marriage Act to provide for homosexual marriage discriminated against them directly on the basis of sex and indirectly on the basis of sexual orientation.
93. In this 2002 case, the UNHRC interpreted Article 23 and its use of the phrase 'men and women' rather than 'every human being', 'everyone' and 'all persons' as its primary point of reference and found that the relevant articles meant that States were only required to recognise the union of a man and woman wishing to marry each other.
94. Some commentators have questioned the UNHRC's narrow interpretation of Article 23 in *Joslin*, particularly in relation to the implications such an interpretation has on the right of same-sex couples to found a family.⁵⁵
95. Despite this narrow interpretation, it has been suggested that the ICCPR would not "prohibit in any way a more expansive definition of marriage being adopted by domestic legislation."⁵⁶
96. At the time the UNHRC considered *Joslin*, the only country to have legalised same-sex marriage was the Netherlands. Given that nine other countries have now passed legislation legalising same-sex marriages, it remains to be seen if the

⁵⁴ CCPR/C/75?D/902/1999 (30 July 2002)

⁵⁵ Aleardo Zanhellini, "To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?", *Melbourne Journal of International Law*, 9(1). Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2008/4.html#fn24>

⁵⁶ Professor Ben Saul, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Marriage Equality Amendment Bill*, 7 March 2012. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/marriage_equality_2012/submissions.htm

UNHRC adopts a similar interpretation if asked to again consider the issue of same-sex marriage and the ICCPR.⁵⁷

97. The Law Council has previously noted that Article 23 can be interpreted in accordance with other developments in international law.⁵⁸ For instance, the Hague Convention does not provide a definition of 'marriage,' preferring instead to allow its meaning to be understood in its 'broadest international sense.'⁵⁹ The Law Council considers that Article 23 can only be understood meaningfully if it is interpreted in light of other ICCPR rights such as the right to freedom from discrimination in Article 26.
98. Article 26 of the ICCPR outlines the right of all people to equality before the law and guarantees protection against discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The LSNSW and LIV suggest that the principles of equality before the law and non-discrimination should be applied when considering the suggested amendments to the Marriage Act, and notes that this approach would be consistent with Australia's international human rights obligations under the ICCPR.
99. Although the ICCPR does not explicitly refer to sexual orientation, the UNHRC has found that its Articles extend to an obligation to prevent discrimination on the ground of sexual orientation. In *Toonen v Australia*,⁶⁰ the UNHRC noted that the references to 'sex' in Articles 2 and 26 should be interpreted as including sexual orientation.
100. The UNHRC has also confirmed that discrimination on the basis of 'sexual orientation' in the law; in the application of the law; or in any action under the authority of the law is prohibited.⁶¹ The LSNSW considers that if civil marriage is only recognised between couples of the opposite sex, it is strongly arguable that this amounts to discrimination against same-sex couples on the basis of sexual orientation and therefore violates Article 26 of the ICCPR.
101. Australia has been criticised for its lack of compliance with its international obligations in relation to the ICCPR. For instance, in 2009 the UNHRC released its observations on Australia's compliance with the ICCPR, noting that it:

*"...remains concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law (Art 2 and 26)."*⁶²

102. Accordingly, the UNHRC recommended that Australia:

*"...adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination."*⁶³

⁵⁷ Above at n 55.

⁵⁸ Above at n 2, p.5.

⁵⁹ A Malstrom, Explanatory Report, Actes et Documents de la XIII^e Session 1976, Tome III, p.41, cited in 'HREOC Submission to the Senate Legal and Constitutional Affairs Committee on the Provisions of the Marriage Legislation Amendment Bill 2004', 26 August 2004.

⁶⁰ (488/92) UN Doc. CCPR/C/50/D/488/92

⁶¹ See for example *Mr Edward Young v Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

⁶² UNHRC, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant:

Concluding Observations of the Human Rights Committee, Australia, CCPR/C/AUS/CO/5

⁶³ Ibid.

103. More recently, a number of countries recommended that Australia introduce national legislation prohibiting discrimination and harassment on the basis of sexual orientation and gender identity as part of Australia's Universal Periodic Review.⁶⁴ Norway specifically recommended that Australia amend the Marriage Act to allow same-sex marriages and also recognise same-sex marriages solemnised overseas.⁶⁵
104. The Law Council believes that prohibiting same-sex marriage fails to adequately protect the rights to equality and non-discrimination for same-sex couples. In order to rectify these inequalities and assist Australia to better meet its obligations under the ICCPR, the Law Council believes that the Marriage Act should be amended to allow same-sex marriages.

Other international instruments

105. In addition to the obligations that arise under the ICCPR, there is also another international instrument that is applicable in the context of same-sex marriage.
106. In 2008, Australia endorsed the UN 'Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity.' This Joint Statement has since been redrafted and was endorsed once again by Australia, along with 84 other countries on 22 March 2011.⁶⁶
107. The Statement calls on States to end human rights violations that are committed against people as a result of their sexual orientation and gender identity. It also calls for a renewed commitment by States to end all forms of discrimination against people based on their sexual orientation and gender identity. The Law Council considers that the Australian Government should build upon this commitment by recognising that the Marriage Act discriminates against same-sex couples and remove the prohibition on same-sex marriages accordingly.

Same-sex marriage laws in other Common Law countries

108. Legislation permitting same-sex marriages has been passed in a number of countries around the world including Canada, South Africa, the Netherlands, Belgium, Spain, Sweden, Portugal, Norway, Argentina and Iceland. A number of states in the United States of America have also introduced legislation allowing same-sex marriages.⁶⁷
109. This submission will focus on same-sex marriage legislation that has been introduced in countries with a similar common law tradition to Australia, namely Canada and South Africa, although it is acknowledged that these countries have a different Constitutional framework, including entrenched Charters of Rights.

⁶⁴ See Recommendations 86.66 - 86.69, Report of Working Group on the Universal Periodic Review – Australia, A/HRC/17/10. Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

⁶⁵ Ibid., Recommendation 86.70.

⁶⁶ <http://geneva.usmission.gov/2011/03/22/lgbtrights/>

⁶⁷ These states include Massachusetts, Iowa, Connecticut, Vermont, New Hampshire, New York and the District of Columbia. See newspaper article at http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?_r=1

Same-sex marriage legislation in Canada

110. The legislation that permits same-sex marriages in Canada is the *Civil Marriage Act 2005* (the Canadian Act).
111. Prior to the introduction of this Act, some Canadian provinces and territories had allowed same-sex marriages to take place as early as 2001. However, these marriages were said to exist in an 'interim legal capacity' given that the federal Canadian Government had not yet enacted legislation for same-sex marriage.
112. By 2004, legislation allowing same-sex marriages had been drafted. The federal Government referred a number of questions relating to the legislation to the Supreme Court of Canada pursuant to a referral power in the *Supreme Court Act RSC 1985*. These questions related to the legislative authority of the federal Parliament to make such a law and to its consistency with the *Canadian Charter of Rights and Freedoms*.
113. In December 2004, the Supreme Court of Canada provided its response to the questions. The Court confirmed that the federal Canadian Government had exclusive authority to amend the definition of marriage so that it included same-sex marriage.⁶⁸ In addition to this, the Supreme Court noted that the right to freedom of religion protected under the *Canadian Charter of Rights and Freedoms* afforded religious institutions the right to refuse to perform same-sex marriages if they felt such marriages conflicted with their religious beliefs.
114. The Canadian Act was introduced to the Parliament on 1 February 2005 and assented to on 20 July 2005.
115. In its preamble, the Canadian Act acknowledges that it is only by allowing same-sex couples to equally access the institution of marriage that their rights to equality without discrimination can be respected. It also acknowledges that the availability of civil unions, instead of marriage, does not offer same-sex couples the equality they are entitled to.⁶⁹
116. Under the Canadian Act, marriage, for civil purposes, is defined as:

 *"...the lawful union of two persons to the exclusion of all others."*⁷⁰
117. The definition is simple and gender-neutral, and does not include any reference to phrases such as "regardless of sex", or "regardless of sex, sexual orientation or gender identity" as proposed by the definitions of marriage in the Jones and Bandt-Wilkie Bills.
118. The definition is broad and inclusive. At the same time, the definition respects the common law understanding of marriage as being a monogamous union. The Law Council encourages consideration by the Committee of the use of a similar definition in the Marriage Act.
119. Section 3 of the Canadian Act contains a similar provision to section 47 of the Marriage Act in that it provides officials of religious groups with the discretion to refuse to perform marriages that are not in accordance with their religious beliefs.⁷¹

⁶⁸ See *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79

⁶⁹ Preamble, *Civil Marriage Act 2005* (Canada)

⁷⁰ *Ibid.*, Section 2.

120. The Canadian Act contains an additional provision in section 3.1, which effectively acknowledges the rights of religious officials to freedom of religion and freedom of conscience if they choose not to perform same-sex marriages. This differs from the Marriage Act, which does not explicitly mention the intention of the Parliament to safeguard any particular rights of authorised celebrants who refuse to perform marriages for one reason or another. The LSNSW notes that allowing civil same-sex marriages does not interfere with the right of religious individuals or organisations to refuse to perform ceremonies inconsistent with their religious beliefs. The Law Council submits that the Committee could consider the inclusion of a similar provision in the Marriage Act.
121. Section 4 of the Canadian Act provides that a marriage is not void or voidable simply because the parties to that marriage are of the same-sex.⁷²
122. Whilst the situation in Canada can be differentiated from that in Australia given the existence of the *Canadian Charter of Rights and Freedoms*, the Law Council considers that the Committee should consider the definition of marriage in the Canadian Act as an alternative to the definitions in the Jones and Bandt-Wilkie Bills. The Law Council also submits that the provision in the Canadian Act which acknowledges the rights of religious officials to freedom of religion and conscience if they do not perform same-sex marriages should also be considered by the Committee.

Same-sex marriage legislation in South Africa

123. Same-sex marriages in South Africa are permitted under the *Civil Union Act 2006* (the South African Civil Union Act), which was assented to on 29 November 2006.
124. Marriages in South Africa are legislated for under two different Acts. The South African *Marriage Act 1961* (South African Marriage Act) applies to marriages between members of the opposite-sex. The South African Civil Union Act, on the other hand, applies to same-sex marriages.
125. The South African Civil Union Act provides for the solemnisation of civil unions in the form of either marriages or civil partnerships,⁷³ and in both cases, confers the same legal rights as a marriage under the South African Marriage Act.
126. The impetus for the introduction of legislation permitting same-sex marriages in South Africa was the case of *Minister of Home Affairs v Fourie*.⁷⁴ This case involved a request by a lesbian couple to have their union recognised and recorded by the South African Government as a valid marriage. The couple argued that the common law definition of marriage and the South African Marriage Act excluded same-sex couples and therefore discriminated against them on the basis of their sexual orientation. They argued that this discrimination breached their Constitutional rights to equality and dignity.

⁷¹ Ibid., Section 3.

⁷² Ibid., Section 4.

⁷³ Section 2, *Civil Union Act 2006* (South Africa)

⁷⁴ *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19. Available from <http://humanrights.uchicago.edu/curriculumdevelopment/winter08/SouthAfricaConstitCt2005-12-01.pdf>

127. Following a number of appeals, the case was eventually brought before the Constitutional Court.⁷⁵ The Constitutional Court handed down its decision on 1 December 2005.
128. In a unanimous decision, the Court held that to the extent that the common-law definition of marriage and the South African Marriage Act excluded same-sex couples from marriage, they were unfairly discriminatory. Accordingly, they were unconstitutional and invalid.
129. In handing down its decision, the Court stated that:

*"The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples."*⁷⁶

130. The Court declared that the common law definition of marriage, which was relied on in the South African Marriage Act, was inconsistent with the applicants' rights under the South African Constitution. The majority determined that the remedy should be the issuing of a declaration of inconsistency, which was to be suspended for 12 months. The Parliament responded to the declaration of inconsistency by enacting the South African Civil Union Act rather than amending the Marriage Act.
131. The South African Civil Union Act reiterates the rights that are protected by the Constitution of the Republic of South Africa such as the right to equality before the law; the right to equal protection and benefit of the law; the right to freedom of conscience, religion, thought, belief and opinion; and protection from unfair discrimination on behalf of the state on a number of grounds including gender, sex, and sexual orientation.⁷⁷
132. 'Marriage' is not explicitly defined in the South African Civil Union Act. Instead, 'civil union' is defined to mean:

*"...the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others."*⁷⁸

133. Same-sex couples who wish to marry under the South African Civil Union Act are able to choose whether they would like their union to be registered as a marriage or

⁷⁵ <http://humanrights.uchicago.edu/curriculumdevelopment/winter08/SouthAfricaConstitCt2005-12-01.pdf>

⁷⁶ *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19 at para 71.

⁷⁷ Preamble, *Civil Union Act 2006* (South Africa)

⁷⁸ *Ibid.*, Section 1.

a civil partnership. Regardless of the union that is selected, the legal rights that attach to marriage under the South African Marriage Act also attach to unions under the South African Civil Union Act. Indeed, to avoid confusion, this is explicitly stated in section 13 of the South African Act.

134. The South African Civil Union Act also includes the words that must be stated by a marriage officer in order to solemnise a marriage or civil partnership,⁷⁹ and also outlines the process that must be followed in order for civil partnerships and marriages to be registered.⁸⁰ The South African Civil Union Act also contains a provision which allows a marriage officer to object to solemnising a same-sex civil partnership or marriage on the grounds of conscience, religion and belief.⁸¹
135. The Law Council suggests that the South African Civil Union Act could be considered by the Committee in addition to the Canadian Act as possible models for same-sex marriage, which are relevant to the Committee's consideration of the Jones and Bandt-Wilkie Bills.

Conclusion

136. The Law Council welcomes the objective of the Bills to create marriage equality. The proposed amendments remove the restrictions that are currently placed on same-sex couples realising their right to marry, and address the discrimination that many same-sex couples experience as a result of being denied the same rights and legal protections as heterosexual couples.
137. The Law Council believes that marriage is a human right which should be made available to all people. Everyone is equal before the law and should be entitled to the same fundamental rights. Australia has nothing to fear from amending the Marriage Act to allow same-sex marriage. Indeed, a number of other countries throughout the world have passed legislation that permits same-sex couples to marry.
138. The Bills send a strong message of acceptance and diversity to members of the community who are currently denied equal entitlement to marriage. The Law Council encourages the Committee to support same-sex marriage in Australia and thanks the Committee for the opportunity to comment on the Bills.

⁷⁹ Ibid., Section 11.

⁸⁰ Ibid., Section 12.

⁸¹ Ibid., Section 6.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.